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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE MANUEL CASTANEDA GARCIA, Defendant and Appellant.	G025436 (Super. Ct. No. 98WF2380) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas J. Borris, Judge. Affirmed as modified.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Carl H. Horst and Douglas P. Danzig, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Jose Garcia of kidnapping for the purpose of committing a lewd act on a child under 14 (Pen. Code, § 207, subd. (b)),[1] and committing

[1] All further statutory references are to the Penal Code.

a lewd act (§ 288, subd. (a)), and found the kidnapping substantially increased the risk of harm to the victim. (§ 667.61, subds. (c)(7) & (d)(2).) Based on the latter finding, he was sentenced to life in prison. He is not eligible for release on parole for 25 years. (§ 667.61, subd. (a).)

Garcia complains the prosecutor improperly used peremptory challenges to exclude two Hispanics from the jury (*People v. Wheeler* (1978) 22 Cal.3d 258), his sentence is cruel and unusual punishment, and imposition of a concurrent eight-year term on the kidnapping count violated section 654. Only the final contention has merit.

I

A detailed factual recitation is not pertinent to the disposition of this appeal. Suffice it to say, six-year-old Mercedes G. was playing on the stairwell outside her Westminster apartment while her mother prepared dinner on October 3, 1998. Defendant, who shared the downstairs apartment with another family, took or lured Mercedes into his darkened bedroom and molested her.

II

Garcia contends the prosecutor improperly used peremptory challenges to excuse two Hispanic jurors from the panel. There were at most 10 Hispanics and no African-Americans on the original venire of 69 prospective jurors. During voir dire, the prosecutor used peremptory challenges to excuse Jurors Gonzalez and Acevedo. After Acevedo's departure, defense counsel requested the prosecutor to justify the challenges pursuant to *Wheeler*, but the trial court found defense counsel had failed to make a prima facie showing of group discrimination. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1091.) We concur.

Preliminarily, a prosecutor's peremptory challenge is presumed constitutional. (*People v. Ayala* (2000) 24 Cal.4th 243, 260; *People v. Alvarez* (1996) 14 Cal.4th 155, 193.) But a party may not use peremptory challenges to remove prospective jurors solely on the assumption they are biased because they belong to an

identifiable racial group. To demonstrate an improper use of a peremptory challenge, the aggrieved party must object and make a prima facie showing of purposeful discrimination. The party must show a reasonable inference, from all the circumstances, that the prospective juror was challenged because of group association. (*People v. Box* (2000) 23 Cal.4th 1153, 1187-1188, & fn. 7.) Where, as here, the trial court denies the motion because it finds no prima facie showing of group bias, the reviewing court considers the entire record of voir dire. If the record suggests grounds on which the prosecutor might reasonably have challenged the juror in question, we must affirm. (*Ibid.*)

We note the challenge of one or two prospective jurors of the same racial or ethnic group as defendant, even when the panel contains no other members of that group, does not necessarily establish a prima facie case. (*People v. Jones* (1998) 17 Cal.4th 279, 293-295 [evidence supported trial court's ruling no prima facie case of group bias in peremptory challenges of four black jurors leaving none on panel]; *People v. Crittenden* (1994) 9 Cal.4th 83, 119-120; *People v. Christopher* (1991) 1 Cal.App.4th 666, 672.)

We have carefully reviewed the record of the voir dire and have determined there were grounds on which the prosecutor might reasonably have challenged both jurors. Juror Gonzalez, the first person excused, was a nurse's assistant and a single parent of a 14-year-old daughter. She had "never been on a [*sic*] jury duty. I'm too scared. . . ." Like most jurors, she had no special training in child sexual abuse or DNA evidence. Nor had she ever discussed sexual or physical abuse with her daughter. Following up on this topic, the prosecutor inquired, "Some people believe that children have a tendency to make up stories more than adults. What do you feel about that?" She replied, "Well, that depends on the situation. Sometimes they do." But she said "I always believe in mine [*sic*] . . . ." Gonzalez reiterated her daughter had never lied to her. The prosecutor remarked she was very soft-spoken and kept her responses to a minimum.

Gonzalez conceded she was more of a "listener" than a "talker," but insisted she would hold her own with more assertive jurors, and did not mind discussing sensitive topics.

The prosecutor dismissed three other jurors before excusing Gonzalez. A short time later, Acevedo replaced a juror excused by a defense challenge. During preliminary questioning regarding hardships, Acevedo voiced concern that jury service would interfere with his college studies. Classes were set to start on the following Monday, and he was taking a full course load. Later, he said he was likely to be preoccupied and worried "because if I'm not there on the first day of classes . . . they'll drop me. There goes $1300 and my 20 units." The judge indicated he would do what he could to help Acevedo, but could not guarantee success. Acevedo, who bagged groceries to pay his tuition, announced he would stay, but was concerned about missing class and his ability to focus on the evidence. None of this was lost on the remaining panel members. When the prosecutor excused Acevedo, the court remarked, "Let the record reflect there was tremendous applause."

Following Acevedo's departure, defense counsel raised a *Wheeler* objection, arguing defendant "should have some representation from the Hispanic community." She thought Gonzalez and Acevedo were unbiased. She acknowledged Acevedo's concerns about school, but he promised to be fair and listen to the evidence despite the distraction. Counsel argued, "It is my position that in both of these situations, inasmuch as we have such a small pool of Hispanic jurors, that the district attorney is systematically excluding that particular class . . . ." The court expressly found the defense had not made a preliminary showing of group bias.

During voir dire, the prosecutor noted Gonzalez appeared very soft-spoken, and elicited she was more of a "listener" than a "talker." She claimed she could assert her point of view during deliberations, but admitted jury service had frightened her in the past. Moreover, the prosecutor could have reasonably concluded Gonzalez was naive based on her belief her 14-year-old daughter had never lied to her. In total, Gonzalez's

responses suggested she lacked experience, common sense, and the fortitude to deliberate on a difficult case, hallmarks of a good juror. (See *People v. Sims* (1993) 5 Cal.4th 405, 430 [youthful appearance and lack of experience are facially race-neutral explanations for dismissal of jurors]; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328 [limited life experience is race-neutral explanation for peremptory challenge].)

As for Acevedo, he had consistently expressed concern about missing school and it appeared the judge was on the verge of granting a hardship dismissal. The prosecutor might reasonably have believed this juror would have difficulty giving his full attention to the evidence or would be tempted to rush through deliberations. More likely, the prosecutor felt sorry for Acevedo and excused him for that reason.

In sum, the court had an adequate basis to determine there was no evidence of a pattern of systematic exclusion. Thus, the burden did not shift to the prosecutor to explain her actions. Defendant's *Wheeler* motion was properly denied.

III

Garcia next claims his sentence (life with a 25-year minimum) was cruel and unusual punishment. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) But Garcia waived the issue by not raising it in the trial court. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27; *People v. Kelley* (1997) 52 Cal.App.4th 568, 583.)

Even if Garcia preserved the issue below, he could not prevail here. The determination of appropriate punishment for a particular offense is a uniquely legislative function the courts may not second-guess unless the penalty is found to be cruel or unusual. (*People v. Dillon* (1983) 34 Cal.3d 441, 478; see also *In re Lynch* (1972) 8 Cal.3d 410, 414-415.) The test in California is whether the punishment is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch*, *supra*, 8 Cal.3d at p. 424.) The defendant must demonstrate the punishment is disproportionate in light of (1) the offense and the defendant's background, (2) more serious offenses in California, and

(3) similar offenses in other jurisdictions. (*Id.* at pp. 429-437.) Defendant must overcome a "considerable burden" to show his sentence was disproportionate to his level of culpability. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.) As a result, "[f]indings of disproportionality have occurred with exquisite rarity in the case law." (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.)

Defendant relies on his nonviolent criminal history and observes other arguably more serious offenses would merit the same or lesser punishment, e.g., he received the same sentence as a premeditated murderer. He argues his current offense "was apparently an isolated event which was entirely out of character . . . ."

Defendant, 30 years old at the time of sentencing, arrived in this country illegally in 1990.[2] He committed a theft that year, as well as drunk driving. Following his failure to complete several alcohol rehabilitation programs, his probation was revoked and terminated. He committed another theft in 1993, and was arrested in 1998 for using cocaine. During the instant offense, Garcia forcefully abducted a young girl outside her home, took her to a secluded location and sexually assaulted her. The victim suffered a torn labia and bruised hymen. As the probation report notes, Garcia showed no remorse, demonstrating more concern for his own safety. He had little insight into his own conduct and denied a serious substance abuse problem. The probation officer concluded Garcia would pose a danger to the community if released.

Nothing about the crime or defendant's background demonstrates that the sentence was disproportionate. We note the purpose of the One Strike law is to ensure dangerous sex offenders receive lengthy prison sentences on their first conviction "where the nature or method of the sex offense 'place[d] the victim in a position of *elevated vulnerability*.'" (*People v. Palmore* (2000) 79 Cal.App.4th 1290, 1296.) Here, the victim was snatched from outside her home and taken to a secluded location so defendant could

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[2] There is no indication in the record whether defendant had a history of criminal conduct in Mexico.

attack her without being detected. A life sentence under these circumstances is not cruel or unusual punishment because "the Legislature could reasonably decide that crimes which involve an inherent danger to the life of the victim are particularly heinous even if no death occurs." (*People v. Crooks* (1997) 55 Cal.App.4th 797, 808.)

Garcia's federal claim is equally unavailing. The Eighth Amendment prohibits only extreme sentences that are "grossly disproportionate"; there is no requirement of strict proportionality between crime and sentence. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001.) Given the severity of Garcia's offense, the likelihood of its lasting effect on the victim and his lack of remorse, his sentence is not "grossly disproportionate" and does not violate the Eighth Amendment.

IV

Garcia argues, and the Attorney General concedes, the trial court erred when it imposed an eight-year concurrent term on the kidnapping count. (§ 654; *People v. Harrison* (1989) 48 Cal.3d 321, 335.) Because the kidnapping was for the purpose of committing the sexual offense, and Garcia has already been punished for that offense, the provisions of section 654 come into play. (See *People v. Flores* (1987) 193 Cal.App.3d 915, 921-922.)

The judgment is modified (§ 1260) to provide that execution of sentence on count 1 is stayed. The stay shall become permanent on completion of sentence on count 2. The trial court is directed to prepare an amended abstract of judgment reflecting this modification and to forward a certified copy to the Department of Corrections. As modified, the judgment is affirmed.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.